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IN THE
COURT OF APPEALS OF INDIANA

DAVID TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0512-CR-564
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 9003

August 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant David Taylor appeals from a determination that he is a Habitual Offender.[1] Specifically, Taylor argues that the trial court erred in admitting two self-authenticating documents into evidence. Additionally, the State cross-appeals, arguing that the trial court improperly permitted Taylor to file a belated notice of appeal. In particular, the State argues that Taylor's petition does not meet the requirements of Indiana Post-Conviction Rule 2. Although the State is correct that the trial court improperly permitted Taylor to file a belated notice of appeal, we choose to address the merits of Taylor's case. Finding that the trial court properly admitted the documents into evidence, we affirm the judgment of the trial court.

FACTS

On June 18, 1984, Taylor pleaded guilty to class B felony armed robbery and two counts of class B felony criminal confinement. On June 27, 1984, a jury convicted Taylor of class A felony rape and class A felony criminal deviate conduct. On June 29, 1984, the trial court sentenced Taylor to consecutive sentences and imposed a thirty-year habitual offender sentence enhancement, with the aggregate sentence totaling 175 years of incarceration. Following a direct appeal, our Supreme Court affirmed Taylor's convictions and sentencing in Taylor v. State, 496 N.E.2d 561 (Ind. 1986). In April 1997, Taylor filed a petition for post-conviction relief, and on December 22, 2000, the post-conviction court granted Taylor partial relief by vacating the habitual offender finding and ordering a jury trial on the habitual offender count.

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[1] Ind. Code § 35-50-2-8.

Taylor's jury trial on the habitual offender count commenced on April 15, 2003. During the trial, Taylor objected to State's Exhibits 5 and 6 on the basis that they were not properly certified to permit self-authentication. These exhibits establish that Taylor had been charged with and convicted of a felony in Kentucky at the time he committed the instant offenses.[2] On April 16, 2003, the jury found Taylor to be a habitual offender, and on July 9, 2003, the trial court added a thirty-year sentence for the habitual offender finding to Taylor's sentence.

Taylor requested an appeal and an attorney was appointed to represent Taylor on appeal. On October 19, 2005, Taylor filed a pro se petition to file a belated notice of appeal, alleging that his appointed attorney had failed to file a timely notice of appeal. The trial court, without holding a hearing, granted Taylor's petition on November 8, 2005. Taylor now appeals and the State cross-appeals.

DISCUSSION AND DECISION

I. Belated Notice of Appeal

The State cross-appeals the trial court's order granting Taylor permission to file a belated notice of appeal. Because the only basis for the trial court's order was Taylor's petition, we apply a de novo standard of review to the decision. Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006).

[2] The State also alleged, and the jury found, that Taylor had previously been convicted of felony arson in the first degree in Laurel County, Kentucky, on August 21, 1980. Appellant's App. p. 29-30, 134-35.

The failure to timely file a notice of appeal constitutes a forfeiture of the right to appeal. Ind. Appellate Rule 9(A)(5). The only exception to that forfeiture is found in Indiana Post-Conviction Rule 2, which states that a defendant may file a petition for permission to file a belated notice of appeal where "(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." The defendant has the burden to prove both requirements by a preponderance of the evidence. Tolson v. State, 665 N.E.2d 939, 942 (Ind. 1996).

In Taylor's petition, he merely alleges that he had requested an appeal following his sentencing on the habitual offender count, that an attorney was appointed to represent him on appeal, and that his attorney failed to file a timely notice of appeal. Appellant's App. Vol. II p. 148-52. Taylor offered no evidence to prove the allegation. Moreover, the petition does not allege that Taylor was diligent in requesting permission to file a belated notice of appeal. Under these circumstances, we conclude that Taylor failed to prove the requirements by a preponderance of the evidence and that, consequently, the trial court erred in granting his petition to file a belated notice of appeal. Given our preference to address cases on their merits, however, we will address Taylor's argument regarding the admission of State's Exhibits 5 and 6.

II. Admission of State's Exhibits 5 and 6

Taylor argues that the trial court erred in admitting State's Exhibits 5 and 6 into evidence because the documents were not properly certified to permit self-authentication. As we consider this argument, we observe that the admission of evidence is within the sound discretion of the trial court, and we will reverse the trial court's decision on such matters only for an abuse of that discretion. Bailey v. State, 806 N.E.2d 329, 331 (Ind. Ct. App. 2004), trans. denied . The trial court abuses its discretion where its decision is clearly against the logic and effect of the facts and circumstances before the court. Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005). In reviewing the trial court's decision, we will consider only the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor. Bailey, 806 N.E.2d at 331.

The purpose of the authenticity requirement for documentary evidence is simply to demonstrate that the item is what its proponent claims it to be. Craig v. State, 730 N.E.2d 1262, 1266 (Ind. 2000). At the time of Taylor's habitual offender trial, documentary evidence that constituted a domestic public record—such as State's Exhibits 5 and 6—did not require extrinsic proof where it was certified in accordance with Indiana Trial Rule 44(A)(1).[3] That rule provides, in pertinent part, as follows:

> An official record kept within the United States, or any state . . . thereof . . ., when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or

[3] On July 1, 2003, this rule was modified to provide that the rules concerning proof of official records are governed by the rules of evidence. Currently, therefore, the admission of domestic public documents is governed by Indiana Rule of Evidence 902(1), which is virtually identical to the former Trial Rule 44(A)(1).

> copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

Ind. Trial Rule 44(A)(1).

State's Exhibit 5 is a grand jury indictment of Taylor from the Oldham Circuit Court in Kentucky, a pretrial dispositional sheet showing an amendment of the charge, and a plea agreement.[4] State's Exhibit 6 is a sentencing order in the same cause from the same court, showing a date of conviction of December 29, 1981. Each of the documents is certified with a stamp as follows:

> CERTIFIED COPY OF RECORD
> OF OLDHAM CIRCUIT/DISTRICT COURT
>
> NO _____81-Cr-033_____
>
> OLDHAM COUNTY CIRCUIT/DISTRICT CLERK
>
> _____DC

Appellant's App. Vol. II p. 1-9. There are initials handwritten on the "DC" line. The State asserts that "DC" signifies "Deputy Clerk," and while there is no independent verification of that assertion, we infer that "DC" does, indeed, signify "Deputy Clerk". See Stewart v. State,

[4] Taylor argues that State's Exhibit 5 is improper because it does not prove a prior conviction, inasmuch as it is only the charging document. State's Exhibit 6, however, does prove that Taylor was convicted on the charge described in Exhibit 5. The State notes that it included Exhibit 5 to prove the commission date of the offense, which is required information to establish that the prior convictions fall within the proper sequence for purposes of the habitual offender count. Thus, Taylor's argument must fail.

688 N.E.2d 1254, 1259 (Ind. 1997) ("[w]hile there is no independent verification, we infer that 'D.C.' signifies Deputy Clerk").

This certification demonstrates that the deputy clerk whose initials appear on the "DC" line has attested that each of these documents is a copy of a record from the Oldham County, Kentucky, Circuit Court in Cause Number 81-CR-033. The deputy's initials are sufficient to constitute a signature. Brewer v. State, 605 N.E.2d 181, 183 (Ind. 1993).

Additionally, Taylor complains that it is unclear whether the documents bear the official seal of the clerk's office. We conclude, however, that the stamp found on the documents providing that they are a "Certified Copy of Record" and signed with the deputy clerk's initials qualifies as a seal of the clerk's office for the purposes of Trial Rule 44(A)(1). Appellant's App. Vol. II p. 1-9.

Pursuant to Trial Rule 44(A)(1), the State was merely required to have a copy of the documents attested to by the officer having legal custody of the records or his deputy. The certification on State's Exhibits 5 and 6 meets the requirements and is, therefore, sufficient to self-authenticate both documents. Thus, the trial court properly admitted these exhibits into evidence.[5]

The judgment of the trial court is affirmed.

MAY, J., concurs.

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[5] Taylor also argues that the evidence was insufficient to support his conviction for being a habitual offender. But the only basis for this argument is Taylor's claim that the trial court erroneously admitted State's Exhibits

SULLIVAN, J., dissent with opinion.

5 and 6 into evidence. Inasmuch as we have concluded that the trial court properly admitted the records into evidence, Taylor's challenge to the sufficiency of the evidence fails.

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SULLIVAN, Judge, dissenting

I respectfully dissent.

I do not base my dissent upon the less-than-certain designation of the person purporting to make the certification of the documents admitted as official records of the Oldham County Circuit Court. For purposes of this appeal I am willing to join the majority's conclusion that the initials on the "DC" signature line are the initials of an employee of the Office of the Clerk of the Oldham County Circuit/District Court. I am also willing to join the conclusion that "DC" signifies Deputy Clerk.

Rather, my dissent is premised upon the absence of the seal of the Clerk of the Oldham County Circuit Court. That absence is fatal to the validity of the

certification/authentication of the questioned exhibits.

As noted by the majority, Trial Rule 44(A)(1) was changed effective January 1, 2004 to delete the provisions relating to domestic and foreign official records, final certification and proof or lack of entry of official records. Now, and at the time in question, such matters were and are governed by the Rules of Evidence, more particularly Rules 901 and 902.

Rule 902 concerns self-authentication. It contains a provision virtually identical with that found in former Trial Rule 44(A)(1). It states that a public document may be evidenced by official publication of the document or by a copy "attested by the officer having the legal custody of the record, or by his deputy." It further provides that such publication or copy need not be accompanied by proof that such officer has the custody.

Although the purported certification by the Deputy Clerk of the Oldham County Circuit Court need not have contained an affirmation that the Deputy Clerk had custody of the record, a valid attestation is subject to other requirements. In my view, if the attesting "officer" or his office has a seal, such seal must be used to import validity to the attestation.

Several cases, although they predate the change to Trial Rule 44, lend support to my conclusion in this regard. In Bartlett v. State, 711 N.E.2d 497 (Ind. 1999), our Supreme Court considered Trial Rule 44(A)(1) in conjunction with Evidence Rules 901 and 902. The Court there held:

"Both [the California and the Kansas documents] were compiled and kept by public officers in their respective states, and both were authenticated by a seal of office." Id. at 502 (emphasis supplied).

In Moore v. State, 515 N.E.2d 1099, 1104 (Ind. 1987), the Court held that although the documents did not contain the seal of the presiding judge, they were properly "certified by the clerk of the court and authenticated by the seal of that office . . . ." (Emphasis supplied). This holding imports that a certification and an authentication are not synonymous.[6] See also Russell v. State, 487 N.E.2d 136 (Ind. 1986) (holding that a document was properly authenticated by the seal of the Department of Correction).[7]

In summation I conclude that if the officer or his office has a seal of office, that seal must be a part of the authentication. For this reason I would reverse and order the habitual offender determination vacated.

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[6] For this reason I disagree with my colleagues that the certification by the deputy clerk as evidenced by a stamp "qualifies as a seal of the clerk's office." Slip op. at 7.

[7] If the Indiana Supreme Court and/or the General Assembly wishes to do away with the arguably antiquated and majestic officialism of a seal, except for ceremonial uses, they may certainly do so.